IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

BARRY L. LUKA, Plaintiff

v. No. 2:94CV51-O

WILSON L. DOUGLAS, et al, Defendants

MEMORANDUM OPINION

Plaintiff Barry L. Luka brings this action against defendant Wilson L. Douglas, Mayor of the City of Hernando, Mississippi; Thomas Tuggle, a Hernando police officer; Jack Bartholomew, Chief of Police of the City of Hernando; Darron Downen, Gene Norwood, Charlie Reese, Andrew Miller and Paul Whitfield, members of the Board of Aldermen of the City of Hernando; and the City of Hernando itself.

Plaintiff asserts that rights guaranteed to him by federal and state law were violated by defendant Tuggle during the early morning hours of February 26, 1993 when defendant Tuggle stopped plaintiff's vehicle without probable cause to do so; placed him under arrest without probable cause to believe that a crime had been committed; violated his second amendment right to bear arms; deprived him of property without due process of law, and committed the state law torts of false arrest and false imprisonment. He further asserts that defendants Douglas, Bartholomew, Downen, Norwood, Reese, Miller and Whitfield were under a duty to provide adequate training to Hernando police officers; that they failed in

that duty, thus violating plaintiff's federally guaranteed rights; and that this failure amounted to an official policy of the city of Hernando, subjecting it to liability for the acts of defendant Tuggle. All of the individual defendants are sued in both their individual and official capacities. Plaintiff asserts his federal claims under 42 U.S.C. §1983 and invokes the pendent jurisdiction of the court over his state law claims.

The defendants have moved for summary judgment in their favor. Upon consideration of the motion papers, the briefs of the parties, the evidentiary materials submitted in support of and in opposition to defendants' motion, as well as the pretrial order agreed upon between the parties and adopted by the court, the court is of the opinion that the Motion for Summary Judgment is well taken and should be granted.

I. THE FACTS

The following facts are, unless otherwise indicated, undisputed.

The plaintiff, Barry L. Luka, is an adult resident citizen of Memphis, Tennessee where he owns and operates an automotive body shop. Plaintiff lives in an apartment above his shop, which is located in a part of Memphis having a high crime rate. Break-ins, burglaries and other crimes are common in that area, causing plaintiff to perceive the need to protect himself by carrying a weapon on his person. He has no permit to carry a weapon,

but says that it is well known to all of his acquaintances, including the Memphis police, that he does so.

On January 6, 1987 the plaintiff was convicted in a Tennessee state court of the felony of aggravated assault. He served his sentence and was granted his final release from incarceration or supervision by the appropriate Tennessee authority. On October 5, 1989 Reginald Gaston, a Tennessee probation officer, issued a "Certificate of Restoration of Voting Rights" to plaintiff which recited, inter alia, "The above individual has been granted final release from incarceration or supervision by the Board of Parole, the Department of Correction, or county correction authorities." On April 10, 1990 David W. Haynes, Jr., Coordinator of Elections of the Department of State, Division of Elections of the State of Tennessee, wrote a letter to Ms. Bobbie D. White, Registrar at Large, Shelby County, Tennessee Election Commission, stating the following: "Please be advised that Barry Luka is eligible to register to vote in Shelby County, his rights of citizenship having been restored. See attached copy. Please contact me if you need additional information." A copy of the "Certificate of Restoration of Voting Rights" was enclosed with that letter. There is no evidence that any other action has been taken by plaintiff or on his behalf to restore his civil rights in Tennessee or elsewhere.

After closing his business in Memphis at approximately 6:00 p.m. on February 25, 1993 plaintiff drove from Memphis to the

Arkabutla Lake spillway in Mississippi for an evening of fishing, stopping along the way only for a soft drink and a snack. Since the side of the spillway where plaintiff intended to fish was in a dry county he took no beer with him after leaving his shop. An exact description of the clothing worn by plaintiff is not available to the court, but it is undisputed that he was wearing coveralls over which he wore a winter coat of some description. Although the court is not provided with a description of it, it is obvious that plaintiff was wearing additional clothing under his coveralls because he testified in his deposition (Deposition, p. 20) that when asked by defendant Tuggle for his drivers license, he replied that it was in his pants pocket which he could not reach through his coveralls without standing up. Plaintiff was also carrying on his person a 9mm Glock pistol which was fully loaded with a round in the chamber. The pistol was in a "fanny pack" around plaintiff's waist, also underneath his coveralls and outer coat.

Plaintiff fished at Arkabutla until 1:00 or 1:30 a.m. on February 26, 1993. He had taken no food with him and at that time became very hungry. Although he was having a successful fishing trip and was enjoying himself, plaintiff decided to cut short his fishing and find something to eat.

Upon leaving Arkabutla plaintiff did not follow his usual route back to Memphis by way of State Highway 301 because he knew that at that time of the morning he would find no eating establish-

ments open along that route. Instead, he decided to take Highway 304 through Hernando, knowing that he would be able to find a place to eat near the interstate highway at Hernando. Plaintiff drove to Hernando along Highway 304. At that time, according to plaintiff's deposition testimony, he was "starving to death" (Deposition, p. 15); "had a headache from not eating" (Id.) and was "tired, hungry, sleepy" (Id., p. 21). He denies that he had been drinking or was intoxicated.

As plaintiff drove through Hernando on Highway 304 he negotiated the square, and just after making a turn from the square to continue on Highway 304 he saw the blue lights on defendant Tuggle's police car flashing and pulled over. It is stipulated in the pretrial order that Tuggle stopped the vehicle being driven by plaintiff on suspicion of DUI. In his affidavit Tuggle states that he saw plaintiff's car "... make a wide right turn, proceed at a very slow speed and weave badly." Tuggle affidavit, p. 1. Plaintiff does not admit that he was weaving or "wobbling in the road," but neither does he categorically deny it. Plaintiff testified on the subject at two points in his deposition. At p. 17 of the deposition he testified as follows.

"Q. Do you know if you were weaving at all?

"A. I don't believe so.

"Q. Do you know for sure?

"A. I would say no, I wasn't.

"Q. Why is that?

"A. I just don't believe I was."

Later, beginning at p. 20, he gave additional testimony on the subject.

> "Q. Did Officer Tuggle tell you why you had been stopped?
>
> "A. Wobbling in the road.
>
> "Q. What was your response?
>
> "A. I don't know what I told him. I told him I was tired and hungry and ready to go home and eat something.
>
> "Q. Could you have said something like, 'I am sorry, Officer, I have been fishing all day and I was beginning to get sleepy'?
>
> "A. Tired, hungry, sleepy, yes, sir.
>
> "Q. So, you could have been weaving because you were tired?
>
> "A. I don't believe I was, but anything is possible."

Plaintiff and defendant Tuggle were the only persons present at the time of the stop, and there is no other evidence as to how plaintiff was driving at the time. Although plaintiff submitted an affidavit with his response to the motion, the subject of his driving is not addressed in that affidavit.

After stopping plaintiff defendant Tuggle approached the car and asked for plaintiff's drivers license. Because plaintiff's license was in his wallet which was in his pants pocket under his coveralls, he could not reach it while sitting in the car. Accord-

ingly, plaintiff got out of the car, retrieved his wallet through the side of his coveralls, and gave his drivers license to defendant Tuggle. A check of plaintiff's drivers license revealed that it was valid. A field sobriety test was administered to plaintiff, but there is not agreement as to the precise timing or circumstances of the test.

At some point after defendant Tuggle stopped plaintiff, another Hernando police officer, James H. Ford, arrived on the scene. According to Tuggle's affidavit it was Ford who administered the field sobriety test to plaintiff. This was done, according to Tuggle, because plaintiff "... was staggering, his speech was slurred, his eyes dilated, and he emitted an odor of intoxicating beverages." Tuggle Affidavit, p. 2. Tuggle's affidavit is corroborated in that regard by the affidavit of Ford. Plaintiff, on the other hand, says, in both his affidavit and in his deposition testimony, that the field sobriety test was administered by Tuggle before Ford arrived on the scene. Both Tuggle and Ford say that plaintiff "unsatisfactorily" completed the field sobriety test. Plaintiff does not deny this, and when asked during his deposition what kind of performance he had on the test, he replied "I don't know." (Deposition, p. 23.)

However, it is undisputed that after the drivers license check and field sobriety test were completed defendant Tuggle decided not to charge plaintiff with DUI, but, instead, to drive

him to a telephone so he could call for someone to pick him up and drive him home. At this point the stories of plaintiff and the officers again diverge.

According to plaintiff's deposition and his affidavit, after administering the field sobriety test defendant Tuggle asked him if there was someone he could call to come get him. When he replied in the affirmative Tuggle offered to drive him to a telephone to make the call. According to plaintiff, as he was preparing to open the door of Tuggle's police car, Tuggle asked him whether or not he was carrying a weapon. It is undisputed that at that time, and, indeed, at all times since he had been in Tuggle's presence, plaintiff had on his person in the fanny pack around his waist the loaded 9mm Glock pistol. According to plaintiff, he answered Tuggle's question truthfully and voluntarily gave the pistol to one of the officers. He does not remember which one (Deposition, p. 27).

According to defendant Tuggle, after it was determined that plaintiff would not be charged with DUI, but would be given a ride to a telephone, Officer Ford performed a "pat down" to insure that plaintiff was not armed before placing him in the patrol car. The pat down revealed the presence of the pistol concealed in plaintiff's clothing. Ford's affidavit is to the same effect.

Plaintiff was then driven to Hernando police headquarters. His car was impounded and his 9mm Glock pistol was delivered

to the court clerk. According to Tuggle's affidavit he transported plaintiff to headquarters. Ford's affidavit states that after conducting the pat down and finding the pistol he returned to his routine patrol and did not accompany Tuggle to headquarters. Plaintiff testified that he does not remember who took him to the police station (Deposition, p. 29).

At police headquarters plaintiff's criminal record was checked through the National Crime Information Center. The NCIC report indicated that plaintiff had been convicted of the felony of aggravated assault in Tennessee on January 6, 1987, but did not indicate that any of plaintiff's rights of citizenship had been restored since the date of the conviction. Plaintiff was then charged with carrying a concealed weapon. He was booked at 4:10 a.m. and released on bail at 4:40 a.m. His girlfriend picked him up at the police station, and later that day he retrieved his automobile from the wrecker service. Plaintiff incurred the expense of posting bail and a towing charge for his car.

Although the court has been provided with no evidentiary materials which directly address the point, and there is no stipulation to that effect in the pretrial order, the parties seem to be in agreement that when plaintiff appeared several days later in Hernando Municipal Court, the concealed weapon charge was dismissed and plaintiff's Glock pistol was returned to him.

It is stipulated that on February 26, 1993 defendant Douglas was the Mayor of Hernando; defendant Bartholomew was the Chief of Police of Hernando; and defendants Downen, Norwood, Reese, Miller and Whitfield were members of the Hernando Board of Aldermen. None of the evidentiary materials before the court addresses the matter of the training of officers Tuggle or Ford, nor, indeed, any other police officer of the City of Hernando. There is no stipulation concerning such training, and plaintiff testified in his deposition that he has "no idea" what training is provided to Hernando police officers (Deposition, p. 51).

II. SUMMARY JUDGMENT STANDARD

Summary judgment should be entered only if "... there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Rule 56(c), Federal Rules of Civil Procedure. The party seeking summary judgment has the initial burden of demonstrating through the evidentiary materials that there is no actual dispute as to any material fact in the case. Celotex Corp. v. Catrett, 477 U.S. 3l7, 323 (l986). On motion for summary judgment, "[t]he inquiry performed is the threshold inquiry of determining whether there is a need for a trial -- whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (l986). In

determining whether this burden has been met, the court should view the evidence introduced and all factual inferences from that evidence in the light most favorable to the party opposing the motion. Id. "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, supra, at 322.

The summary judgment procedure does not authorize trial by affidavit. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict." Anderson v. Liberty Lobby, Inc., supra, at 255. Accordingly, a court may not decide any factual issues found in the record on motion for summary judgment, but if such material issues are present, the court must deny the motion and proceed to trial. Impossible Elec. Tech. v. Wackenhut Protection Systems, 669 F.2d l026, l03l (5 Cir. l982); Environmental Defense Fund v. Marsh, 65l F.2d 983, 99l (5 Cir. l98l); Lighting Fixture & Electric Supply Co. v. Continental Ins. Co., 420 F.2d l2ll, l2l3 (5 Cir. l969).

Under the provisions of Rule 56(e), Federal Rules of Civil Procedure, a party against whom a motion for summary judgment

is made may not merely rest upon his pleadings, but must, by affidavit, or other materials as provided in Rule 56, inform the court of specific facts showing that there is a genuine issue for trial. Celotex Corp. v. Catrett, supra, at 324. The facts stated in uncontradicted affidavits or other evidentiary materials must be accepted as true. However, the moving party must still show that he is entitled to judgment on those facts as a matter of law, and if he fails to discharge that burden he is not entitled to judgment, notwithstanding the apparent absence of a factual issue. 6-Pt. 2, Moore, Federal Practice (2d Ed.), ¶56.22[2], p. 56-777.

Summary judgment is not proper if a dispute about a material fact is "genuine," or in other words the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson, supra at 248. There is no such issue unless the evidence sufficiently supports the non-moving party's version of the facts for a jury to return a verdict in the non-moving party's favor. Id., at 249. The relevant inquiry is whether or not there is sufficient disagreement on the facts to submit them to the jury or whether it is so one-sided that one party should prevail as a matter of law. Id., at 251. The issue must be genuine, and not pretended, and the evidence relied on to create such an issue must be substantial. Southern Distributing Co. v. Southdown, Inc., 574 F.2d 824, 826 (5 Cir. 1978); Schuchart & Associates v. Solo Serve Corp., 540 F.Supp. 928, 939 (WD Tex. 1982).

III. THE STOP

One of plaintiff's claims is that defendant Tuggle was without probable cause to stop him as he was driving through Hernando during the early morning hours of February 26, 1993. Defendant's motion and plaintiff's response thereto requires the court to determine whether or not there is a genuine issue of material fact on the point.

A routine traffic stop is a limited seizure closely analogous to a "Terry stop." Berkemer v. McCarty, 468 U.S. 420, 439 (1984). Thus, the legality of such a stop is to be evaluated under the standard enunciated in Terry v. Ohio, 392 U.S. 1, 19-20 (1968). Pennsylvania v. Mims, 434 U.S. 106 (1977); United States v. Shabazz, 993 F.2d 431, 436 (5 Cir. 1993); United States v. Kelley, 981 F.2d 1464, 1467 (5 Cir. 1993). Under that standard a police officer must only have a reasonable suspicion that a person has violated the law in order to stop him. Terry, supra, at 19-20.

If defendant Tuggle saw plaintiff driving slowly and erratically through Hernando at 2:20 a.m., or, as he said in his affidavit, "... make a wide right turn, proceed at a very slow speed and weave badly ..." this was enough to give rise to a reasonable suspicion that the driver of the vehicle so observed was intoxicated or otherwise impaired. United States v. Thomas, 12 F.3d 1350, 1366 (5 Cir. 1994).

Defendant Tuggle's affidavit to that effect is clear, direct and unequivocal. Plaintiff's opposing evidence is not. See, p. 6, supra. Applying the principles discussed in part II, supra, the court must determine whether or not the plaintiff's evidence is substantial enough to permit a jury in this case to draw therefrom the inference that when he was observed by defendant Tuggle he was driving in a normal manner, and not erratically as described by Tuggle. If so, then plaintiff has created a genuine issue of material fact, and summary judgment is improper as to that issue. If not, defendants are entitled to summary judgment in their favor on that issue. Though the question is a close one, the court concludes that plaintiff's evidence is not sufficient to create a genuine issue.

Nowhere in the evidentiary materials does plaintiff undertake to directly and unequivocally deny that he was driving in the manner described by defendant Tuggle. At best, his evidence is inferential rather than direct. This is not necessarily fatal to his case because, even though inferential evidence may normally not be sufficient to overcome direct evidence to the contrary, if the inferential evidence is strong enough it may be sufficient to support a finding by the trier of fact to the contrary of the direct evidence. The Wenona, 86 U.S. 41, 58 (1873); Pregeant v. Pan American World Airways, Inc., 762 F.2d 1245, 1249, n. 5 (5 Cir. 1985); Farmland Industries, Inc. v. Grain Board of Iraq, 904 F.2d

732, 737-738 (DC Cir. 1990); Rutherford v. American Bank of Commerce, 565 F.2d 1162, 1164 (10 Cir. 1977). Though the court must view all inferences that can be drawn from the evidence in the light most favorable to plaintiff, Anderson v. Liberty Lobby, Inc., supra, at 250, it must consider what inferences a jury could reasonably draw from that evidence.

In order for plaintiff to avoid summary judgment in this case the jury must be able to reasonably infer from the evidence that on the occasion in question plaintiff was driving normally and not in a manner which gave rise to a reasonable suspicion on the part of defendant Tuggle that his capacity to operate an automobile was impaired by alcohol or some other cause. Plaintiff's testimony is that at that time he was tired, hungry and sleepy. While he was not willing to unequivocally admit that he was weaving, and asserted that he did not believe he was, he admitted that it was possible. In the opinion of the court the inference most favorable to plaintiff which a reasonable trier of fact could draw from that testimony is that plaintiff, though tired, hungry and sleepy, does not know whether he was weaving or not and therefore believes that he was not. In the court's view that is insufficient to carry plaintiff's burden on his claim that there was no probable cause for defendant Tuggle to stop him. Plaintiff's inferential evidence is neither strong enough nor substantial enough to permit a reasonable trier of fact to find that, contrary to defendant

Tuggle's unequivocal statement to the contrary in his affidavit, plaintiff was driving in a normal and non-suspicious manner when Tuggle saw him. Indeed, if that were the state of the evidence at trial defendants would be entitled to judgment in their favor as a matter of law on the probable cause to stop issue. See, Webster v. Offshore Food Service, Inc., 434 F.2d 1191, 1193 (5 Cir. 1970), cert.den., 404 U.S. 823 (1971). The trier of fact would not be at liberty to arbitrarily disregard Tuggle's unequivocal, uncontradicted and unimpeached testimony. Webster v. Offshore Food Service, Inc., supra. Plaintiff's evidence is simply insufficient to contradict or impeach the evidence of defendant Tuggle. In addition to his deposition testimony plaintiff submitted an affidavit with his response to the motion. That affidavit addresses all of the events of that early morning except the way plaintiff was driving when seen by Tuggle. The affidavit afforded plaintiff a ready opportunity to create an issue of fact on the cause to stop issue. His silence is deafening.

The court therefore finds that there is no genuine issue of material fact and that defendants are entitled to judgment in their favor as a matter of law on plaintiff's claim that defendant Tuggle was without probable cause to stop him during the early morning hours of February 26, 1993.

IV. THE ARREST

Probable cause to arrest exists "when the facts and circumstances within the arresting officer's knowledge and of which he had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed." United States v. Savage, 564 F.2d 728, 732 (5 Cir. 1977).

Although plaintiff was suspected of driving under the influence and failed the field sobriety test, Officers Tuggle and Ford did not intend to arrest him until they learned of the pistol. The parties dispute how the weapon was discovered. Officer Ford states in his affidavit that he found the weapon when he performed a "pat down" prior to placing plaintiff in the patrol car. Plaintiff contends that he offered the weapon before getting into the patrol car. Although there is a factual dispute, the court finds that the facts potentially most favorable to the plaintiff are the officers' version of the incident, i.e. that Ford frisked plaintiff for the weapon since this search raises Fourth Amendment considerations. Plaintiff makes no constitutional or other argument concerning the discovery of the weapon, and accepting plaintiff's version of the facts, that he volunteered the weapon, no constitutional questions are raised.

Plaintiff was then taken to the police station where a criminal history was obtained, revealing him to be a convicted

felon. He was charged at that time with carrying a concealed weapon.

It is clear to the court that the facts and circumstances before Officer Tuggle were sufficient for him to believe that an offense had been committed by the plaintiff, and therefore probable cause existed to arrest him on a weapons charge.

Plaintiff argues, however, that he was charged with carrying a concealed weapon, rather than with possession of a weapon by a convicted felon, and that there was no probable cause to arrest him on that charge. He also argues that there was not even cause to charge him with possession of a firearm by a convicted felon.

Upon arrival at the police station, Officer Tuggle obtained a criminal history report from the National Crime Information Center (NCIC) which revealed plaintiff to be a convicted felon. Miss. Code §97-37-5 provides that any person convicted of a felony under the laws of this state or any other state shall be guilty of a felony if found to possess any firearm or other dangerous weapon unless such person has been pardoned for such felony. Plaintiff complains that, although he was arrested based on the NCIC report, he was charged under another statute, Miss. Code §97-37-1, which prohibits the carrying of a concealed weapon.

Plaintiff argues first that he had received a pardon from the State of Tennessee and therefore was no longer a convicted felon within the meaning of §97-37-5. In support of this contention plaintiff provides a copy of a letter to the Registrar of Elections stating that his rights of citizenship had been restored, Exhibit B to Response to Motion, and he relies on the provisions of §40-29-105 Tenn. Code (1990). However, that statute concerns the restoration of the right to vote only, not all civil rights, and specifically not the right to bear arms. United States v. White, 808 F.Supp 586, 588 (MD Tenn. 1992). In Tennessee a convicted felon must petition a circuit court to have full restoration of his citizenship rights before his right to bear arms may be restored. Id., at 589-90. Plaintiff has not asserted, nor has he otherwise shown, that such procedure has been followed. Plaintiff offers the affidavit of Richard F. Vaughn, a Tennessee attorney, in support of his contention that full rights were restored with his right to vote. However, Vaughn does not mention any proceedings in circuit court on plaintiff's behalf, and his opinion that nothing more than a letter to the registrar of voters was necessary to restore plaintiff's right to bear arms is clearly contrary to the holding in White, supra.

Thus, plaintiff was not pardoned, and the information before Officer Tuggle at the time of plaintiff's arrest was that he

was a convicted felon, which was sufficient cause to arrest him under §97-37-5.

However, plaintiff was not ultimately charged under Miss. Code §97-37-5, but was charged under §97-37-1. Plaintiff contends that there was not probable cause to arrest him under that statute because it provides that a person may carry a concealed weapon inside his vehicle and that the only reason he was not in his vehicle was because he was ordered to get out by Officer Tuggle.[1] Plaintiff also argues that he met the "sports" exception provided in §97-37-1 in that he was engaged in a legitimate sports activity when he was stopped. The court declines to determine whether or not plaintiff's fishing expedition constitutes a legitimate sports activity within the meaning of the statute, since he clearly was not engaged in any sport when he was outside the car after Tuggle stopped him.

Regardless of the ultimate facts as to plaintiff's circumstances, the information known to Tuggle at the time of his arrest was that plaintiff was carrying a concealed weapon on his person outside a vehicle, and his criminal history revealed an unpardoned felony conviction. There was thus probable cause to

[1] The court finds it disingenuous for plaintiff to claim that it was the officer's insistence that caused him to be out of the car when he admitted that he had to get out to retrieve his wallet and the weapon because his billfold and the fanny pack were under-neath his coveralls, and he was wearing an arctic coat on top of the coveralls. Luka Deposition, at 20, 26.

arrest plaintiff on either charge, and he cannot complain that he was charged with the lesser of the two. Plaintiff cites no authority for his argument that the statutory authority to have a concealed weapon inside a vehicle carries with it the right to conceal the weapon on one's person once he leaves the vehicle if it was on his person inside the vehicle. In the absence of clear authority for such an anomalous position, the court is unwilling to accept it. Even if that argument were well taken, "'[W]hen a crime under which the arrest is made and a crime for which probable cause exists are in some fashion related, then there is no question but that there is a valid arrest.'" Trejo v. Perez, 693 F.2d 482, 485 (5 Cir. 1982) (quoting Mills v. Wainwright, 415 F.2d 787 (5 Cir. 1969). See also, United States v. Atkinson, 450 F.2d 835, 838 (5 Cir. 1971), cert.den. 406 U.S. 923 (1972) (same). Thus, the court finds that Officer Tuggle had probable cause to arrest the plaintiff.

V. OTHER CONSTITUTIONAL CLAIMS

A. SECOND AMENDMENT

The purpose of the Second Amendment is to preserve the effectiveness of and assure the continuation of the militia. United States v. Miller, 307 U.S. 174, 178 (1939). An individual's right to bear arms is not absolute and the amendment places no limitation on the power of the state to define the conditions under which the right may be asserted. United States v. Romero, 484 F.2d 1324 (10

Cir. 1973). State laws proscribing the carrying of concealed weapons after having been convicted of a felony do not infringe upon the right to bear arms guaranteed in this amendment. State v. Sanders, 357 So.2d 492 (La. 1978). See also, State v. Goodno, 511 A.2d 456 (Me. 1986); Masters v. State, 685 S.W.2d 654 (Tex. Crim. App. 1985). Plaintiff has not specified in his complaint or in response to the motion what particular actions by the defendants were in violation of the Second Amendment. Neither party has cited cases on this point. Since no specific violations were alleged by plaintiff to have been committed by any particular defendant, the claims must fail as a matter of law.

B. DUE PROCESS

Plaintiff claims that his property was taken without compensation and under color of state law. Specifically, plaintiff complains that his car was towed without his authorization and he incurred expense in retrieving it. Also, his gun was confiscated and plaintiff was forced to retain counsel to get it back.

The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. Mathews v. Eldridge, 424 U.S. 3319, 333 (1976). Due process does not always require a hearing prior to deprivation of property especially when there are "extraordinary situations" which justify postponing such a hearing. Fuentes v. Shevin, 407 U.S. 67, 90 (1972). Such situations exist when: 1) the deprivation is

directly necessary to secure an important government interest or general public interest; 2) there is a special need for prompt action; and 3) the person seizing the property is a government official responsible for determining that prompt action was necessary under the circumstances. Id., at 91. The circumstances before Officer Tuggle were a driver suspected of being under the influence and carrying a concealed weapon on his person. As a matter of government interest, as well as general public interest, it was important that plaintiff's vehicle be removed from the roadway promptly and that he be relieved of his weapon. It was also necessary to secure plaintiff's automobile. Since Officer Tuggle was driving plaintiff to the police station in his police car plaintiff could not drive his vehicle. It was not unreasonable for the police to have it towed to a place of safety. There is no due process violation in such a circumstance so long as "some form of fair and impartial hearing at which an owner is provided an opportunity to challenge the lawfulness of removing his car and assessing charges against him [is] provided within a reasonable time period." Breath v. Cronvich, 729 F.2d 1006, 1010-11 (5 Cir. 1984), cert.den., 469 U.S. 934. As plaintiff concedes, his car was returned to him the following day, and after the concealed weapon charge was dismissed, his weapon was also returned. The court finds no due process violation, and defendants' motion is sustained on this ground also.

C. FAILURE TO TRAIN

Plaintiff's claims against the Mayor, Police Chief, Aldermen, and the City of Hernando are based on an alleged failure to train and instruct Officer Tuggle which resulted in the alleged violations of plaintiff's constitutional rights. Specifically plaintiff alleges that if the city officials had made Tuggle aware that it was legal to carry a concealed weapon in a vehicle he would never have charged plaintiff with a weapons violation.

An allegation of inadequate training must be supported by evidence of a policy or custom which is the "moving force" of the constitutional violation. Monell v. New York City Dept. of Social Services, 436 U.S. 658, 694 (1978). An isolated incident is not enough to support a policy or custom, the violations must be repeated, persistent and constant violations to constitute a policy or custom. Palmer v. City of San Antonio, 810 F.2d 514, 516 (5 Cir. 1987); Bennett v. City of Slidell, 728 F.2d 762, 768 n.3 (5 Cir. 1984). Plaintiff states in his response to the motion that his "contention is not that there was an existing policy that violated his constitutional right," but that the governing authorities of the City of Hernando "had an affirmative duty to operate the police department under such policies as will reasonably prevent the violation of citizens' constitutional rights by said department." However, plaintiff stated at his deposition that he had no idea what training the officers were given. Luka

Deposition, at 51. No other evidence has been offered by plaintiff to show that Tuggle's training was inadequate, nor, indeed, that there is any deficiency in Hernando's training of its police officers. Since the court holds that Tuggle did not act without probable cause, his actions on the morning in question provide no basis for a failure to train claim. Therefore, the defendants' motion for summary judgment is also well taken as to this claim.

VI. STATE LAW CLAIMS

Plaintiff has asserted pendent state law claims against defendants for false arrest and false imprisonment and for violations of his constitutional rights under Article 3, Sections 12, 14, 17 and 23 of the Mississippi Constitution.

False arrest is a component of false imprisonment, which occurs when one causes another to be arrested falsely, unlawfully, maliciously and without probable cause. City of Mound Bayou v. Johnson, 562 So.2d 1212, 1218 (Miss. 1990); Godines v. First Guaranty Savings & Loan Association, 525 So.2d 1321, 1324 (Miss. 1988). Having found that there was probable cause to arrest the plaintiff, the court also finds that plaintiff's arrest and brief detention at the police station were not "false" and therefore his claims for false arrest and imprisonment must fail as a matter of law.[2]

[2] Plaintiff asserts in his response to the motion that "a prima face [sic] case for false arrest (and therefore false imprisonment) exists where the party charged is exonerated by the

The court also finds no merit in plaintiff's claims under the state constitution.

Section 12 of the Mississippi Constitution is the state counterpart of the Second Amendment to the Federal Constitution and expressly authorizes state regulation of arms.

Section 14 concerns due process of law, which is addressed supra.

Section 17 concerns the taking of property for public use without compensation. Plaintiff has made no claim that his vehicle or weapon were taken for any public use. The vehicle was towed to a safe place to protect plaintiff's property, and the weapon, seized as contraband, was promptly returned after the concealed weapon charge was dismissed.

Section 23 is the state counterpart of the federal Fourth Amendment, which has been discussed in considerable detail in Parts III and IV, supra. The court is convinced that there was no unreasonable search or seizure.

Therefore, plaintiff's state law claims are not well taken and must fail as a matter of law.

VII. IMMUNITY

A. FEDERAL QUALIFIED IMMUNITY

Court." Plaintiff offers no authority for this "common law rule," and the court was unable to find such a principle in cases discussing the elements of false arrest and false imprisonment.

Under the doctrine of qualified immunity even if actions of the defendants are found to have violated the constitutional rights of plaintiff, they are not liable in damages unless their conduct violated clearly established constitutional rights of the plaintiff which should have been known at the time to reasonable persons in their positions. Davis v. Scherer, 468 U.S. l83, l9l (l984); Harlow v. Fitzgerald, 457 U.S. 800, 8l8 (1982); Lynch v. Cannatella, 8l0 F.2d l363, l374 (5 Cir. l987). Thus, the focal point of a qualified immunity defense is whether or not the constitutional right said to have been violated was clearly established at the time of the alleged violation. Thompson v. City of Starkville, 90l F.2d 456 (5 Cir. l990). Since the court finds that no constitutional rights were violated the defendants are entitled to qualified immunity.

B. STATE LAW SOVEREIGN IMMUNITY

The court finds it unnecessary to discuss in detail the convoluted history of Mississippi immunity law, rather it will attempt to describe the most recent changes and attempt to fix the law as it was at the time this cause of action accrued. The Mississippi Supreme Court first sought to abolish sovereign immunity in Pruett v. City of Rosedale, 421 So.2d 1046 (Miss. 1982). The state legislative response to Pruett was to enact the Sovereign Immunity Act which included a waiver of immunity provision, but the legislature delayed implementation of the Act year after year in an

effort to preserve sovereign immunity. One provision of the Act, Miss. Code §11-46-6, preserved immunity law as it existed pre-Pruett until such time as the Act was finally implemented. In an attempt to resolve the "stand off" between the legislative and judicial branches of the state, the Mississippi Supreme Court declared §11-46-6 unconstitutional and again attempted to abolish sovereign immunity from the date of its decision in Presley v. Mississippi State Highway Commission, 608 So.2d 1288 (Miss. 1992). However, in response to the Presley decision, the state legislature called an emergency session to repeal the statute declared unconstitutional by the court in Presley, but retained immunity for the state and its political subdivisions with certain exceptions. See, Van Ovost v. City of Ackerman, 147 F.R.D. 112, 119 (ND Miss. 1993) (excellent discussion of the history of Mississippi immunity law). In Van Ovost, the court found the state of the law on February 11, 1993 to be the statutory and case law which existed pre-Presley. Plaintiff's cause of action accrued on February 26, 1993. Prior to Presley the legislature had restored immunity law to its state prior to the state supreme court's decision in Pruett. Under Mississippi law at that time, sovereign immunity depended upon whether the governmental conduct complained of occurred in the context of a governmental function (immunity) or a proprietary function (no immunity). Webb v. Jackson, 583 So.2d 946, 952 (Miss. 1991). The operation and regulation of a police

department is clearly a governmental function. Morgan v. City of Ruleville, 627 So.2d 275 (Miss. 1993), citing Anderson v. Jackson Municipal Airport Authority, 419 So.2d 1010, 1014-15 (Miss. 1982).

Thus, the City of Hernando is immune from suit on plaintiff's state law claims.

C. STATE LAW OFFICIAL IMMUNITY

Whether or not the individual defendants are immune from plaintiff's state law claims depends upon whether their actions were ministerial or discretionary. Barrett v. Miller, 599 So.2d 559, 567 (Miss. 1992). Immunity is not available if the official action is merely ministerial. Id., at 567. If the act is one which has been imposed by law and in a manner or upon conditions which are specifically designated and the duties are not dependent upon the officer's judgment or discretion, then the acts are ministerial. Id., at 567. While the execution of a search warrant may be ministerial since it is an act imposed by law, the determination of probable cause is discretionary. Id.

The determination of probable cause is clearly dependent upon the officer's judgment or discretion and the court therefore finds that Officer Tuggle was entitled to official immunity under state law.

The defendants Mayor of Hernando, Wilson L. Douglas; the members of the Hernando Board of Aldermen, Darren Downen, Gene Norwood, Charlie Reese, Andrew Miller, and Paul Whitfield; the

Police Chief, Jack Bartholomew are charged with failing to have a policy to adequately train and instruct the Hernando police officers. Establishing and implementing a policy is clearly a discretionary function and therefore these defendants are also entitled to official immunity under state law.

For the foregoing reasons the court finds that there are no genuine issues of material fact and that the defendants are entitled to summary judgment in their favor as a matter of law. A separate order in accordance with this opinion shall issue this day.

THIS, the 17th day of January, 1995.

_____
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

BARRY L. LUKA, Plaintiff

v. No. 2:94CV51-S-O

WILSON L. DOUGLAS, et al, Defendants

FINAL JUDGMENT

In accordance with a memorandum opinion entered this day, defendants' Motion for Summary Judgment as to all claims is well taken, and the same is hereby **granted**. Final judgment is hereby entered in favor of the defendants and this cause of action is dismissed with prejudice as to all claims.

In sustaining the motion for summary judgment, all memoranda, depositions, affidavits and other matters considered by the court in sustaining the defendants' motion for summary judgment are hereby incorporated and made a part of the record in this cause.

SO ORDERED, this, the _____ day of January, 1995.

UNITED STATES MAGISTRATE JUDGE